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Supreme Court U. S.
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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner,

—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

MOTION OF ARTHUR B. WEISS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

ARTHUR B. WEISS,
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—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

Motion for Leave to File Brief as *Amicus Curiae*.

May It Please the Court:

Upon the annexed consent of all parties hereto, the undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

ARTHUR B. WEISS,
No. 1115 Main Street,
Bridgeport, Connecticut.

Consent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

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BETHLEHEM STEEL COMPANY,

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—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

IT IS HEREBY CONSENTED that Arthur B. Weiss, Esq., of 1115 Main Street, Bridgeport, Connecticut, may file and serve herein a brief as *amicus curiae*.

Dated, New York, April 19, 1939.

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IN THE

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OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner,

—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

BRIEF OF ARTHUR B. WEISS, AS AMICUS CURIAE.

Statement.

The reason for filing this brief is that the undersigned is attorney for "Credimus" Maatschappij tot Deelneming in Industrieele Bedrijven N. V., a Dutch corporation. Said "Credimus" is the owner and holder of certain bonds and interest coupons known as the San Francisco Terminal bonds and coupons of the Southern Pacific Company, a Kentucky corporation. Such bonds and interest coupons contain multiple currency clauses substantially similar to those involved in the present case.

The interest coupons in suit (R. 12) confer upon the holder a two-fold option. The holder may not only elect the *currency* of payment. In addition to and coupled with such option, he may also elect the *place* of payment. Under the terms of the bonds and

coupons, the defendant is under a duty to make payment, at the option of the holder, in New York, London, Frankfort o/M, Amsterdam, Brussels, Basel or Zurich. The plaintiff presented its coupons for payment at the designated paying office in Zurich, Switzerland. Zurich became thereby the place of performance of the coupons in suit.

We shall refrain from repeating the factual details which are adequately stated in the briefs of the parties. This brief will be confined to the question of law: whether the performance of defendant's promise to pay, at the option of the couponholders, a designated amount of Swiss Francs in Switzerland was excused by the enactment of Public Resolution No. 10, 73d Congress, of June 5, 1933 (48 Stat. at L. 112) (hereinafter referred to as the "Joint Resolution").

It is our contention that the Joint Resolution does not affect the multiple currency clauses here involved for two separate and independent reasons:

1. The Joint Resolution outlaws only *gold* clauses; it does not affect obligations to make payment *in a foreign currency.*

2. The Joint Resolution outlaws only gold obligations payable *within the United States;* it does not affect obligations to make payments (whether in gold or otherwise) which are due *in a foreign country.*

The first of these propositions has been amply argued by the respondent. This brief will, therefore, deal only with the second proposition, *i. e., that the Joint Resolution has no extra-territorial force.*

Outline of Argument.

The purpose and policy of the Joint Resolution must be ascertained by considering it against the background of the legislative measures preceding it (*Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, at 295, 297). The law in effect immediately before the enactment of the Joint Resolution excused only gold payments *due within the United States;* it did not excuse the obligations of American citizens to make gold payments *due in a foreign country.* The Joint Resolution purported merely to confirm and to clarify this state of the law, not to change it; this intent of Congress is proved by ample evidence. The Joint Resolution does not, therefore, apply to payments (in gold or otherwise) which are due in a foreign country. This territorial limitation of the Joint Resolution is justified by the very reasons of policy which led to its enactment. Moreover, it is in accordance with recognized rules of international law which Congress presumably did not intend to disregard. If promises to pay gold abroad are valid, it follows, *a fortiori*, that promises to pay sums of foreign currency in a foreign country are equally valid. Finally, a promise to pay gold or foreign currency abroad is not vitiated by the mere fact that it is contained in an alternative contract under the terms of which the creditor might also, at his option, demand gold payment in the United States.

POINT I.

The law in effect immediately before the enactment of the Joint Resolution excused only gold payments due within the United States, but not those due in a foreign country.

The previous enactments shedding light upon the purpose and construction of the Joint Resolution are summarized in *Norman* v. *Baltimore & O. R. Co., supra,* at pages 295-297. These enactments, here pertinent, were the Emergency Banking Act of Congress of March 9, 1933 (48 Stat. at L. 1, chap. 1; 12 U. S. C. §95a) and the Executive Orders of the President of March 10, 1933 (No. 6073), of April 5, 1933 (No. 6102) and of April 20, 1933 (No. 6111). Briefly, they prohibited the hoarding, and required the delivery to the government, of gold coin, gold bullion and gold certificates *"within the continental United States"*; and they prohibited the export of gold coin, gold bullion and gold certificates *"from the United States."*

Under these provisions, it was obviously lawful and proper for an American citizen to acquire, to sell and to dispose of gold coin, gold bullion or gold certificates *situated in a foreign country.* Thus it was altogether lawful for an American citizen to purchase gold abroad, to keep it abroad, and to use it for the payment of his foreign gold debts. In fact, the right of American citizens to hold gold abroad has been expressly recognized by the Department of Justice.

> Opinion of the Attorney General of May 25, 1933, 37 Op. Att'y Gen'l 155.

What, then, was the effect of this legislation, preceding the Joint Resolution, upon debts previously contracted and payable in gold?

Clearly, gold debts *payable in the United States* had become impossible of performance. Nobody could lawfully acquire, hold or retain gold within the United States; and the Treasury had declared that "gold is not now paid, nor is it available for payment, upon public or private debts" (Treasury Statement of May 26, 1933, quoted in *Norman* v. *Baltimore & O. R. Co.*, *supra*, at p. 314). Consequently, gold debtors were excused from their duty to make gold payments *within the United States* (6 Williston on Contracts, rev. ed. 1938, pp. 5425, *et seq.*; *Irving Trust Company, etc.* v. *Hazlewood, etc.*, 148 Misc. 456, 265 N. Y. Supp. 57, [Sup. Ct., New York County, decision of May 24th, 1933]).

Not so gold debts *payable abroad*. Gold was abundantly available in foreign countries. Foreign gold was expressly exempted from the operation of the Executive Orders. An American citizen holding gold abroad was fully privileged to retain it, sell it, give it away, or to apply it to the payment of his foreign gold debts. If he owned no gold, he was at liberty to purchase it in the foreign markets and to use it for the payment of such of his gold debts as were payable abroad. The gold legislation preceding the Joint Resolution was, therefore, no obstacle to the payment abroad of gold debts due in foreign countries. Such payment, being neither impossible nor illegal, was therefore enforceable in our courts.

POINT II.

The Joint Resolution merely purported to confirm and to clarify this state of the law, not to change it.

This is made abundantly clear by the reports of the Senate and House Committees relative to the adoption of the Joint Resolution. These reports have been recognized by this Court as an important source for determining the policy and construction of the Joint Resolution (*Norman* v. *Baltimore & O. R. Co., supra,* at pp. 311, 312, 314).

The Senate Committee on Banking and Currency, in its Report of May 27, 1933 (Sen. Rep. No. 99, 73d Cong., 1st Sess.), stated:

> "Certain *questions of interpretation* have arisen with respect to the legislation empowering the President to prevent the withdrawal and hoarding of gold, and the provision in the Thomas amendment making all coins and currencies legal tender for all debts. Additional and immediate legislation is necessary to remove the disturbing effect of this *uncertainty* and to insure the success of the policy by closing possible legal loopholes and removing inconsistencies.
>
> * * * * * * *
>
> "It is of the utmost importance that legislation along the lines of that suggested in the Joint Resolution be enacted because:
>
> "(a) *It completely regularizes the present de facto situation as to both public and private debts.*

"(b) (Relates to a prospective offering of Treasury obligations.)

"(c) *It would greatly facilitate administration of the laws against hoarding.*

"(d) *It would eliminate an existing uncertainty in business.*

"(e) It places old 'gold clause' and new 'legal tender' obligations on the same footing in respect of payment.

"(f) It would make certain of accomplishment the declared policy of Congress." (Italics supplied.)

Similarly it was said by the Committee on Banking and Currency of the House of Representatives (H. R. Rep. No. 169, 73d Cong., 1st Sess.):

> *"This legislation is complementary to the steps already taken under the Emergency Banking Act* to protect the monetary system and is essential for the accomplishment of material recovery." (Italics supplied.)

The Joint Resolution thus purports to clarify "*questions of interpretation*" and "*uncertainty*" with respect to the previous gold legislation. But so far as the gold situated outside the United States was concerned, there existed no "uncertainty" and no "question of interpretation"; for the President's Executive Orders were by their express terms restricted to gold "*within the continental United States*". Congress naturally knew this territorial limitation. Had it been the intention of Congress to eliminate the limitation, Congress would have said so. But then the

Joint Resolution could not have been characterized as legislation only *"complementary to the steps already taken"*, purporting merely to *"regularize the present de facto situation as to both public and private debts"*. Language such as this allows of no conclusion other than that Congress, in enacting the Joint Resolution, still had no intention to interfere with the acquisition, holding and disposal, by citizens of the United States, of gold situated abroad and with the use of such gold for the payment of gold debts due abroad. The consequence is inevitable that even under the Joint Resolution the performance of gold obligations payable in foreign countries continues to be possible, legal and enforceable.

POINT III.

The territorial limitation of the Joint Resolution is justified by the very reasons of policy which led to its enactment.

The evils to be averted by the Joint Resolution are succinctly described in *Norman* v. *Baltimore & O. R. Co., supra,* at page 315. The devaluation of the dollar placed the domestic economy on a new basis. Public and private corporations would continue to receive payment for their services in the existing currency; yet their outstanding gold bonds would call for an amount of currency determined by the former gold standard. Thus, in terms of dollars, the income of the gold bond debtors would remain the same as before, while their debt burden would be considerably increased. To balance this "dislocation of the domestic economy", the Joint Resolution was enacted and gold clauses were abolished.

It is an outstanding feature of this reasoning that the dollar, despite its descent from the gold standard, was to retain its previous domestic purchasing power. For a decline of the domestic purchasing power of the dollar would have been tantamount to an increase of the domestic price level; and increased prices for their services would have compensated the gold debtors for an increased gold debt burden. The gold clauses could cause a "dislocation of the domestic economy" only if all other prices (except the price of gold) remained stable.

On the other hand, it was only the stability of the domestic purchasing power of the dollar, that protected the bondholders from suffering detriment and injustice through the Joint Resolution. Indeed, so long as the domestic purchasing power of the dollar remained the same, the gold clause was academic and unnecessary. The bondholder who has paid $1,000 for his bond and is repaid the same amount, has no ground for complaint. Quite properly was it said, therefore, in Congress:

> "From a material point of view the obligee suffers no damage if what he receives is of equal value with what he claims. At the present time, all currency and coins, including gold coins, are equal in purchasing power within the United States. * * * Therefore, the Joint Resolution, in fact, does not subject the obligee to any material damage, and he cannot claim to have suffered any deprivation of property unless and until he can show some material damage. * * *" (p. 4893).
>
> "We are not depriving anybody of any property or of any value or of any rights they now

have, except that we are not proposing to pay in gold absolutely the obligations, but we are giving what is equal to gold, what is as good as gold, and no one can claim that he has lost anything by this kind of transfer" (p. 4890).

(Statement of Senator Fletcher, Congressional Record, Vol. 77, Part 5, pp. 4889, 4890.)

However, dollar payments due in a foreign country are on a different level. The domestic purchasing power of the dollar is of no account at the foreign place of payment. There the value of the dollar is determined exclusively by its relation to the local currency, and, of course, the value of the dollar, as compared with the foreign local currency, has been considerably reduced. While, in the case of domestic payments, the gold clause abrogation was comparatively innocuous because of the stability of the domestic purchasing power of the dollar, no such redeeming feature existed with respect to foreign payments. The creditor of a gold bond who was entitled to receive payment abroad, would be deprived, by the gold clause abrogation, of 40% of the value of his claim.

Obviously, Congress did not intend such a result. Congress, as has been shown, was anxious not to deprive bond creditors of their property and not to inflict detriment upon them. Detriment indeed was avoided in the case of domestic payments; but it would have been inevitable, had the Joint Resolution been extended to foreign payments. The very policy of the Joint Resolution fortifies, therefore, the conclusion that it was to have merely territorial operation.

POINT IV.

The territorial limitation of the Joint Resolution to gold debts payable in the United States is in accordance with recognized principles of the conflict of laws.

The attitude of the United States government is indicative of the purpose and policy of the Joint Resolution and deserves, therefore, special consideration. Reference is made to the

> Opinion of the Attorney General of August 22, 1933, 37 Op. Att'y Gen'l 250.

It was held therein that the Joint Resolution has no extra-territorial force and that, where a gold contract was made and was to be performed abroad, the American gold debtor was still under the duty of making the gold payment in the foreign country as provided in the contract.

Indeed, it is firmly embedded in our jurisprudence that the performance of contracts and excuses for non-performance are governed by the laws of the place of performance.

> *Zimmermann* v. *Sutherland*, 274 U. S. 253;
> *Central Hanover Bank & Trust Co.* v. *Siemens & Halske A. G.*, 15 Fed. Supp. 927, aff'd on op. below, 84 Fed. (2d) 993, cert. den. 299 U. S. 585;
> Restatement of the Law of Conflict of Laws (1932) Secs. 358, 360.

Legislation abrogating gold clauses and similar provisions do not, therefore, affect payments due in foreign countries.

Anglo-Continentale Treuhand A. G. v. *St. Louis Southwestern Railway Co.*, 81 Fed. (2d) 11, cert. den. 298 U. S. 655, *sub nom. Henwood* v. *Anglo-Continentale Treuhand A. G.*;

Pan American Securities Corporation v. *Fried. Krupp A. G.*, 169 Misc. 445, 6 N. Y. Supp. (2d) 993, aff'd App. Div. 10 N. Y. Supp. (2) 205.

Congress must be deemed to be familiar with this rule. Its failure to make contrary provision would seem to be conclusive evidence of the Congressional intent to limit the Joint Resolution to the territory of the United States.

The defendant, while paying lip service to the principle of territoriality, seeks to emaciate it. Foreign courts, defendant concedes, are not bound by the Joint Resolution; but any one resorting to an American court is said to be subject to the mandate of the Resolution (Petitioner's Main Brief, p. 29). However, the rule of territoriality is not only meant for foreign courts. Our own courts refuse to apply our law where application would amount to giving it extra-territorial operation. Thus a combination in restraint of trade, entered into in a foreign country by American citizens, was held not to violate the Sherman Act of July 2, 1890; for even though the Act was not in terms confined to the United States, it was held to have merely territorial operation (*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347). The so-called "Seaman's Act" of Congress, prohibiting the advance payment of seamen's wages, was held to be territorial and therefore not to outlaw advance

payments of wages made in England (*Sandberg* v. *McDonald*, 248 U. S. 185). Similarly our courts should not give extra-territorial effect to the Joint Resolution by applying it to payments due in a foreign country.

If a promise to pay gold in a foreign country is not within the ban of the Joint Resolution, it follows, *a fortiori*, that a promise to pay a sum of foreign currency in a foreign country is equally exempt from the Resolution.

POINT V.

A promise to pay a sum in foreign currency abroad, valid in and by itself, is not vitiated by the fact that it is contained in an alternative contract, by the terms of which the creditor might also, at his option, demand a gold payment in the United States.

The origin of the Joint Resolution and its declared policy, court decisions and rulings of administrative agencies, all demonstrate that a promise by an American citizen to pay gold or a sum of foreign currency in a foreign country is not affected by the Joint Resolution. Can it be said that such a promise, innocuous in itself, is vitiated by the fact that it is coupled with an alternative promise to make a gold payment in the United States?

The defendant contends for such a vitiating effect. It does so despite the rule that the supervening impossibility or illegality of one alternative branch of a contract does not discharge the other alternative duty (*Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, at 358; 6 Williston, *op. cit. supra*, pp. 5304 *et seq.*).

Defendant's argument is based on the second sentence of clause (a) of the Joint Resolution, providing in effect, that every "obligation" payable in American money, whether or not containing a gold clause, shall be discharged upon payment, dollar for dollar, of its face amount. Each of defendant's coupons, although containing a number of alternative promises, is said to be *one* "obligation". And since one of the alternative promises contained therein calls for the payment of gold dollars, the whole "obligation" is "payable in money of the United States". The coupon, *i. e.*, the "obligation", may therefore, according to defendant, be discharged by the payment of its dollar face amount, and the other alternative promises must be completely disregarded.

Nothing is to be gained by quibbling about the abstract meaning of the word "obligation". Only the contextual meaning and the purpose and policy of the Joint Resolution are of account. The Resolution outlaws promises to pay gold dollars in the United States; such promises may be discharged by payment, dollar for dollar. But the Resolution does not affect promises to pay gold or foreign exchange in a foreign country. If a promise to pay gold dollars in the United States and a promise to pay a sum of foreign currency in a foreign country are alternatively combined in one contract, the purpose and policy of the Joint Resolution are satisfied by striking down the gold payment due in the United States. But we see no conceivable reason why destruction should be extended to the innocuous promise of paying foreign currency in the foreign country. If this promise, standing alone, is beyond the ban of the policy of the Joint Resolution, it is no less compatible with our

public policy if coupled with an alternative dollar promise.

Defendant's theory, it is submitted, would lead to preposterous consequences. Let the crucial sentence of the Joint Resolution, and the construction given it by the defendant, be more closely scrutinized. Taking its essential content, as understood by the defendant, this sentence says:

> "EVERY OBLIGATION PAYABLE IN MONEY OF THE UNITED STATES, WHETHER OR NOT A GOLD CLAUSE IS CONTAINED THEREIN, SHALL BE DISCHARGED UPON PAYMENT, DOLLAR FOR DOLLAR, IN LEGAL TENDER." (See also the sentence, as paraphrased in Defendant's Main Brief, p. 19.)

It is important to note that the "obligation payable in money of the United States", referred to in this sentence, need *not* be a *gold* dollar obligation; it may also be, for instance, a silver dollar obligation, or just a plain dollar obligation.

With this sentence in mind, defendant proceeds to argue that every contract containing alternative promises is an entire "obligation"; and if only one of the alternative promises contained therein calls for the payment of dollars (gold dollars, or silver dollars, or just plain dollars), the whole "obligation" is "payable in money of the United States" and may therefore be discharged by payment, dollar for dollar, the other alternative promises being completely disregarded and nullified.

What is the effect of this theory upon everyday types of alternative contracts? Let it be assumed that one party promises, for a consideration, either to

convey Blackacre to the other party or to pay him, at his option, a sum in dollars (it makes no difference whether they are gold dollars, silver dollars, or just plain dollars). According to defendant's theory, the transaction would fall under the ban of the Joint Resolution. For the contract, although consisting of two alternative promises, constitutes one entire "obligation". And one of the alternative promises calls for the payment of money of the United States. The whole "obligation" can therefore, according to defendant's theory, be discharged by payment, dollar for dollar, and the buyer of the option cannot demand the conveyance to him of the land which he bargained for. In short, defendant's construction of the Joint Resolution would make it impossible for businessmen to enter into any kind of alternative contracts, in which one of the alternative promises calls for a dollar payment.

Needless to say, the Joint Resolution was never intended to operate in such a manner upon alternative contracts. The manner in which the Resolution does operate upon the coupons in suit is clear and simple. If the creditor demands payment in the United States, the gold clause will be disregarded and the coupon will be paid, dollar for dollar in legal tender. If the creditor demands payment in Switzerland, the coupon is payable in Swiss Francs and will be discharged by payment, Franc for Franc. Such is exactly the payment which the plaintiff herein demands. Quite appropriately was it therefore said by the Court below (R., 71):

> "The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency."

The Circuit Court of Appeals for the 8th Circuit has sought to minimize that election (*Guaranty Trust Co. v. Henwood*, 98 Fed. (2) 160, 165, cert. granted, 59 S. Ct. 146). The demand for payment in the foreign country is "known to be futile"; the exercise of the option is termed as "running around an international stump"; the bondholder is said to attempt to enrich himself at the expense of the debtor; and that result would be reached "with further saving of exchange charges" "by a simple mathmetical calculation".

It is hard to conceive how these arguments bear upon the applicability of the Joint Resolution. If a contract gives the creditor an option, there must be some method of exercising it. The debtor cannot nullify the option by declaring in advance that he will default and that therefore the demand for payment abroad is "known to be futile". The "saving of exchange charges" upon the exercise of the option is hardly an argument to show that no option may be exercised at all. The simile of an "international stump" is a mere figure of speech. And a creditor who receives the contractual payment at the contractual place in the currency thereof, can hardly be said to enrich himself at the expense of the debtor.

It is submitted that by virtue of plaintiff's demand, the bonds in suit are payable in Zurich, Switzerland; under the laws of Switzerland, the defendant is under the duty of paying the amount of Swiss Francs indicated in the coupons. The Joint Resolution of Congress does not purport to effect that duty.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

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